

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR**

Freedom of Information Act Appeal: 2011-40

July 13, 2011

Peter L. Goldman, Esq.

Dear Mr. Goldman:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537(a)(2001) (“DC FOIA”), dated June 7, 2011 (the “Appeal”). The Appeal was filed as part of a notice under D.C. Official Code § 12-309. You, on behalf of Saga Adventures, Inc. (“Appellant”) assert that the Department of Youth Rehabilitation Services (“DYRS”) improperly withheld records in response to your requests for information, dated June 3, August 10, and August 18, 2010, under DC FOIA (the “FOIA Requests”) by failing to respond to the FOIA Requests.

Background

Appellant’s FOIA Requests sought records as follows:

1. The June 3, 2010 FOIA Request sought records in 43 categories relating to Quadri-Technology, Saga Adventures, Inc., and DYRS operations.
2. The August 10, 2010 FOIA Request sought the number of persons awaiting placement who are in the “Youth Service Center” or in shelter homes operated by DYRS or a contractor and a DYRS work plan for January through August 2010.
3. The August 18, 2010 FOIA Request sought “all documents, all commitments, and placement dates” from August 1, 2010, through September 5, 2010 with respect to three entities, Quadri-Technology, Peaceoholics, Trinity, and, with respect to any service provider, “didactic referral sheets.”

On August 16, 2010, DYRS sent a letter to Appellant stating that, pursuant to instructions from its counsel, Peter Goldman, Esq., to the DYRS General Counsel, that the two FOIA Requests received to date were suspended until the receipt of further instructions from its counsel. Both Mr. Goldman and the DYRS General Counsel were copied on the letter. There is no evidence of any further activity thereafter.

On Appeal, Appellant asserts that DYRS improperly withheld records by failing to respond to the FOIA Requests.

In its response, dated July 7, 2011, DYRS contends that the Appeal should be dismissed and advances several arguments in support of its position. First, Saga Adventures, Inc., filed an action against DYRS and the District, which action included allegations that DYRS failed to respond to the FOIA Requests. DYRS has attached the orders dismissing the action and asserts that this Appeal is barred by the doctrine of res judicata. Second, because the FOIA Requests were suspended as reflected in the August 16, 2010, letter, and DYRS has not received further instructions, DYRS has not failed to respond the first two FOIA Requests specified in the letter and, due to the proximity of the time as to the suspension, the third FOIA Request as well. Third, as to the third FOIA Request, DYRS asserts that the requested records are privileged and confidential under D.C. Official Code § 2-1515.06 and, as Appellant does not qualify under one of the specified categories of persons who are permitted to inspect such records, are exempt from disclosure under D.C. Official Code § 2-534(a)(6).

Discussion

It is the public policy of the District of Columbia (the “District”) government that “all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.” D.C. Official Code § 2-537(a). In aid of that policy, DC FOIA creates the right “to inspect ... and ... copy any public record of a public body . . .” *Id.* at § 2-532(a). Moreover, in his first full day in office, the District’s Mayor Vincent Gray announced his Administration’s intent to ensure that DC FOIA be “construed with the view toward ‘expansion of public access and the minimization of costs and time delays to persons requesting information.’” Mayor’s Memorandum 2011-01, Transparency and Open Government Policy. Yet that right is subject to various exemptions, which may form the basis for a denial of a request. *Id.* at § 2-534.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act, *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987), and decisions construing the federal statute are instructive and may be examined to construe the local law. *Washington Post Co. v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

The first contention of DYRS is that the Appeal must be dismissed because the issue was decided in the action filed by Saga Adventures, Inc., in Superior Court and such decision governs in the Appeal under doctrine of res judicata. We have examined the complaint filed in the action and the orders of the Court. While it is true, as DYRS states, that Saga Adventures, Inc. alleged in the complaint that DYRS failed to respond to the FOIA Requests and that the order notes the filing of the FOIA Requests, res judicata does not apply. The causes of action alleged in the complaint were fraud, constructive fraud, and fraud in the inducement, but it did not state a cause of action under DC FOIA. The court did mention the FOIA Requests in one of the orders, but it did so in a footnote which was part of a statement of the procedural predicate for its decision.

The second contention of DYRS is DYRS has not failed to respond to the FOIA Requests because the FOIA Requests were suspended as reflected in the August 16, 2010, letter and

DYRS has not received further instructions. As to the first two FOIA Requests, we agree. While the instructions from Saga's counsel to the DYRS General Counsel were oral, both counsel were copied on the confirmation letter. Therefore, there was no denial of these FOIA Requests.¹ Accordingly, the Appeal must be dismissed as to these FOIA Requests as D.C. Official Code § 2-537(a) authorizes appeals only from denials of requests to inspect records. Technically, the third FOIA Request was received after the date of this letter and was not covered by the letter. However, given the timing of the instructions, the letter, and the third FOIA Request, it is understandable that DYRS interpreted the suspension to apply to all of the FOIA Requests. Nevertheless, as a matter of administrative efficiency, we will treat the response of DYRS as the response to the third FOIA Request and consider its contention that the records requested are exempt from disclosure.

The third contention of DYRS is that the requested records are privileged and confidential under D.C. Official Code § 2-1515.06 and, therefore, are exempt from disclosure under D.C. Official Code § 2-534(a)(6). D.C. Official Code § 2-534(a)(6) exempts from disclosure:

(6) Information specifically exempted from disclosure by statute (other than this section), provided that such statute:

(A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(B) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

D.C. Official Code § 2-1515.06 provides, in pertinent part:

(a)(1) Records pertaining to youth in the custody of the Department or contract providers shall be privileged and confidential and shall be released only in accordance with this subsection. . . .

(3) Juvenile social records shall be released only to persons and entities permitted to inspect those records under § 16-2332 and in accordance with the procedures governing the release of records under that section.

D.C. Official Code § 16-2332 provides that juvenile social records may be inspected by the specified personnel of the Courts, specified Family Court case participants and law enforcement officers, specified government agencies and entities, and “[o]ther persons having a professional interest in the protection, welfare, treatment, and rehabilitation of the respondent or of a member of the respondent's family, or in the work of the Family Court, if authorized by rule or special order of the court.”

Although not stated explicitly, it is implicit in the response of DYRS that the requested records are juvenile social records. Accordingly, the requested records are privileged and confidential under D.C. Official Code § 2-1515.06. As Appellant does not qualify under one of the specified

¹ As the Appeal has been filed almost one year after the date of the letter, we could attribute this to forgetfulness. However, we note that the complaint making the same allegations was filed in Superior Court one month after the date of the letter.

categories of persons who are permitted to inspect such records under D.C. Official Code § 16-2332, the requested records are exempt from disclosure under D.C. Official Code § 2-534(a)(6).

As explained above, as there was no denial of the first and second FOIA Requests and D.C. Official Code § 2-537(a) authorizes appeals only from denials of requests to inspect records, it is not within our province to order agency action with respect to these FOIA Requests. Nonetheless, we would advise DYRS to treat this as a renewal of the first and second FOIA Requests. Appellant should understand that this is a renewal of the original FOIA Requests and subject to the same determinations and exemptions which would have been made in 2010 as of the date of the original filings. Among other things, as DYRS noted that the first FOIA Request was vague and overbroad as to time, Appellant should also expect that DYRS would first need to contact Appellant in accordance with DCMR § 1-402.5 to supplement the request with the necessary information to permit a reasonable search to go forward in those cases where the request is otherwise proper.

Conclusion

Therefore, with respect to the first and second FOIA Requests, there was no denial of the FOIA Requests; with respect to the third FOIA Request, the decision of DYRS is upheld. The Appeal is DISMISSED.

This constitutes the final decision of this office. If you are dissatisfied with this decision, you are free under the DC FOIA to commence a civil action against the District of Columbia government in the District of Columbia Superior Court.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Dionne Hayes, Esq.